

## **Draft recommendation of the European Ombudsman in her inquiry into complaint 1184/2012/(ER)PMC against the European Commission**

Recommendation

**Case** 1184/2012/PMC - **Opened on** 05/07/2012 - **Recommendation on** 06/12/2013 - **Decision on** 15/04/2014 - **Institutions concerned** European Commission ( Draft recommendation partly accepted by the Institution ) | European Commission ( No further inquiries justified ) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### **The background to the complaint**

1. The complainant in the case at hand is an Italian airline company. The complaint concerns the timeliness of the Commission's handling of a state aid complaint.
2. On 22 December 2003, the complainant submitted a state aid complaint concerning allegedly unlawful state aid received by one of its competitors for the flights operated from and to a regional airport in Italy.
3. By letter of 11 June 2004, the complainant formally called upon the Commission to define its position with regard to its complaint.
4. As of July 2004, the Commission was in regular contact with the competent Italian authorities, as well as, later on, with interested third parties. In particular, the Commission sent a non-confidential version of the complaint to the Italian authorities on 9 July 2004.
5. On 5 October 2004, the complainant brought an action for failure to act before the General Court in accordance with (what is now) Article 265 TFEU [2] , which was rejected on 10 May 2006 [3] . In its judgment, the Court considered that when the complainant called upon the Commission to act, the duration of the Commission's inquiry had been six months, which was less than the period for which the Court, in cases of a similar complexity, had previously held that there was a failure to act.
6. On 21 November 2005, the complainant asked the Commission to extend the scope of its



investigation by including material concerning two further airports.

7. By letters of 27 June and 30 November 2006, the Commission requested further information from the Italian authorities. In parallel, by letters of 26 November 2006 and 10 January 2007 addressed to the Commission, the complainant asked the Commission to narrow the scope of its investigation.

8. On 17 January 2007, the Commission again requested further information from Italy.

9. On 12 September 2007, the Commission initiated the procedure foreseen in Article 108(2) TFEU [4] against Italy. On 17 January 2008, the Commission published in the Official Journal an invitation for interested parties to submit comments on the aid at stake [5] .

10. By letter dated 20 June 2008, the complainant supplemented its complaint to the Commission. The Commission subsequently submitted the material sent by the complainant to the Italian authorities for comments.

11. On 1 September 2009, the Commission signed a contract with a consultancy firm in order to prepare a report in relation to the on-going state aid investigation, which was finally submitted on 30 March 2011.

12. In April 2010, following a request for information from the complainant, the Commission informed it that the General Court's recent judgment in *Ryanair v Commission* [6] made it necessary to consider more carefully the application of the "market economy investor principle" ('MEIP') [7] to the case of airport state aid. Several external studies had been commissioned on the matter.

13. On 30 March 2011, the Commission sent a request for additional information to the Italian authorities, enclosing the before-mentioned report of a consultancy firm.

14. On 19 October 2011, the Commission transmitted the comments submitted to it by an interested party to Italy for comments.

15. On 5 June 2012, the complainant turned to the Ombudsman.

16. On 27 June 2012, the Commission decided to extend the scope of its investigation to assess whether additional support measures are in line with EU state aid rules. The scope of the investigation now was also to cover infrastructure subsidies by the State, further support to the airport operator in form of the repayment of losses and increases of capital and additional contracts concluded with the airlines operating at the airport.

## **The subject matter of the inquiry**

17. In its complaint, the complainant made the following allegation and claim.



## **Allegation**

Contrary to the principles of good administration and in particular the principle that decisions should be taken within a reasonable time, the Commission failed to take a timely decision on the complainant's state aid complaint.

## **Claim**

The Commission should take a decision on the complainant's state aid complaint.

## **The inquiry**

**18.** On 5 July 2012, the Ombudsman opened an inquiry and invited the Commission to submit an opinion. The Commission sent its opinion to the Ombudsman on 25 October 2012. The opinion was forwarded to the complainant, who sent observations the following day.

## **The Ombudsman's analysis and conclusions**

### **Preliminary remarks**

**19.** Considering the close connection between the complainant's allegation and claim, the Ombudsman will deal with them jointly.

**20.** The Ombudsman recalls that, in October 2004, the complainant brought an action for failure to act before the General Court concerning the Commission's alleged failure to take a decision concerning its state aid complaint. In accordance with Articles 1(3) and 2(7) of the Statute of the Ombudsman [8] , the Ombudsman is not entitled to deal with cases which have been dealt with by a court. However, it should be noted that the issue raised by the complainant in the present case is not covered by the Court's judgment, given that the latter only concerns the first six months of the Commission's investigation, but not the subsequent period.

### **A. The Commission's alleged failure to take a timely decision on the complainant's state aid complaint and the related claim**

### **Arguments presented to the Ombudsman**



**21.** In its complaint, the complainant alleged that, contrary to the principles of good administration and in particular the principle that decisions should be taken within a reasonable time, the Commission failed to take a timely decision on its state aid complaint. The complainant claimed that the Commission should take a decision on this complaint.

**22.** In its opinion, the Commission argued that the length of the investigation was justified in the present case. It submitted that the following factors have to be considered when assessing the present complaint.

**23.** According to the Commission, the complainant's initial complaint was too broad and contained allegations relating to several airports. The complainant subsequently narrowed the scope of its complaint by letters of 26 November 2006 and 10 January 2007. This fact slowed down the Commission's initial assessment of the case and had the result that a decision on the opening of a procedure pursuant to Article 108(2) TFEU could only be taken in September 2007 (the '2007 decision'). Moreover, in the course of the investigation, the Commission became aware of other measures potentially constituting state aid which were linked to the subject matter of the complaint. It was therefore necessary to extend the formal investigation in order fully to assess all the measures at stake. This implied a prolongation of the investigation. The Commission observed that the complainant did not seem to have been aware of the fact that the Commission had decided to extend the investigation procedure and to investigate the alleged measures in even greater depth [9] when it lodged its complaint with the Ombudsman.

**24.** The Commission regretted the length of time that the investigation that was triggered by the complainant's state aid complaint needed. However, contrary to the complainant's suggestion that the Commission had been inactive as regards the period which followed the registration of the complaint, the Commission had been in constant contact with the Italian authorities and had been actively and constantly investigating the complainant's state aid complaint. Since the 2007 decision, the Commission followed all the procedural steps as envisaged by Regulation 659/1999 [10]. It moreover handled and assessed comments made by the Italian authorities and by third parties. In line with the applicable rules, the comments submitted by third parties, which often required translation, were sent to the Italian authorities for their comments.

**25.** The Commission also submitted that it was necessary to ask an external contractor to carry out a study and explained that, after having received all the information solicited through the 2007 decision, the case and the data to be analysed had proved to be particularly complex. In particular, in order to ascertain whether the airport operator under investigation behaved like a normal investor, an analysis necessary to demonstrate the existence of state aid, the Commission had to be in possession of a large amount of data and "*the analysis had to be performed on the basis of ex ante elements*". With a view to performing such an evaluation, the Commission decided to commission an external contractor to proceed to the necessary assessment of the relevant measures and to perform the related on the spot verifications. It was only on 30 March 2011, and after numerous contacts with the Commission's services, that the external contractor delivered the final study.

**26.** The Commission added that three reasons played a role as regards the overall length of



the investigation: (i) a large volume of information had repetitively been submitted by the parties concerned; (ii) the Italian authorities almost systematically requested extensions of the deadlines set to them to provide information or to submit comments; and (iii) it was necessary to translate several documents submitted in English into Italian.

**27.** The Commission submitted that the fact that the examined measures are of a complex character also largely contributed to the length of the procedure. In this regard, the Commission asserted that the case at hand is undeniably complex and displays many novel features. In addition, the examined measures were taken in the context of a market which has considerably evolved during the past years. The Commission pointed out, for instance, that the market to provide air services evolved considerably with the boom of low costs carriers which is not necessarily reflected by the current state aid rules. In that context, the Commission put forward that it is intensively working on adapting the state aid rules to the fast market changes undergone by the aviation sector in recent years. The revision of the Aviation Guidelines [11] is a major project for the Commission's services that are at the same time carrying out investigations in the present and several other cases in the aviation sector. The preparation of new Aviation Guidelines has an impact on the pending investigations in terms of resources and the new guidelines may also affect their outcome. What was more, in 2008, the General Court concluded that the Commission had not applied the market investor test correctly and annulled the relevant decision in its judgment in *Ryanair v Commission* [12]. This prompted the need to take account of the implications of the judgment in all on-going investigations raising similar issues, including the one in which the complainant is interested.

**28.** The Commission concluded by pointing out that it undertook to reach a final position on this case as soon as possible. However, it also underscored the need to follow the procedural steps envisaged by Regulation 659/1999. The Commission added that it envisaged " *being in a position to take a final decision in the coming months* ".

**29.** In its observations, the complainant essentially maintained its complaint and stated that, instead of unconvincing arguments, it expected an apology together with a specific commitment that the Commission would finalise its investigation rapidly.

## **The Ombudsman's assessment leading to a draft recommendation**

**30.** The Ombudsman recalls that, as regards the investigation of state aid complaints by the Commission, two different phases can be identified. First, the preliminary investigation and, second, the formal investigation procedure (Article 108(2) TFEU). In the case at hand, the Ombudsman is called upon to assess the timeliness of the Commission's handling of a state aid complaint. Her assessment will thus cover both investigation phases.

**31.** As regards the timeliness of decisions in general, the Ombudsman recalls the contents of Article 17 of the European Code of Good Administrative Behaviour [13] as well as of point 7(1) of the Commission's Code of Best Practice for the conduct of state aid control procedures [14].



While the former provides that decisions have to be taken within a reasonable time-limit, the latter states that the Commission " *will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt* ".

## As regards the preliminary investigation phase

**32.** The Ombudsman recalls that, in the case at hand, the complainant lodged its state aid complaint with the Commission on 22 December 2003, while the latter opened the formal investigation procedure on 12 September 2007 only. Consequently, it took the Commission *48 months* or exactly *four years* to conclude its preliminary investigation into the complainant's state aid complaint.

**33.** The General Court, in its judgment in *Air One SpA v Commission* [15] , ruled that the Commission is required to conduct a diligent and impartial examination of a complaint alleging the existence of aid that is incompatible with the common market, in the interests of sound administration of the fundamental rules of the Treaty relating to state aid. In the Court's view, the Commission therefore cannot prolong indefinitely its preliminary investigation into state aid that has been the subject of a complaint where it has accepted to launch such an investigation by asking the Member State concerned to provide information [16] .

**34.** Additionally, in *Gestevisión Telecinco v Commission* and *TF1 v Commission* , the Court held that whether or not the duration of the investigation of a complaint is reasonable must be determined in light of the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case [17] . In the above-mentioned cases, the Court considered that there was an unlawful failure to act on the part of the Commission with respect to state aid complaints the handling of which had taken between 26 and 47 months. In its judgment in *Air One Spa v Commission* , the Court referred to the fact that the state aid complaint brought by the complainant is " *undeniably complex and displays a certain novelty* " [18] .

**35.** It should be recalled that, in the present case, it took the Commission 48 months to decide to open the formal investigation procedure. This is a very long period of time, particularly if one considers that, in its Code of Best Practice for the conduct of state aid control procedures, the Commission announced that it would use 'its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt'.

**36.** The Ombudsman notes that, in its opinion, the Commission referred to the complexity of the case and the fact the complainant had modified the scope of its complaint while it was examining it. The complainant does not seem to dispute the fact that its complaint raises difficult issues. The Ombudsman further notes that, after having asked the Commission in November 2005 to extend the scope of its investigation, the complainant subsequently requested it to narrow the scope of this investigation. It seems clear that these changes made it more difficult for the Commission to decide whether to launch the formal investigation procedure.



**37.** The fact remains, though, that even if one were to disregard the period between the date when the complainant asked for an extension of the investigation (21 November 2005) and the dates on which it asked for the investigation to be narrowed (26 November 2006 and 10 January 2007), the remaining period of time would still be substantial. Moreover, the preliminary investigation phase is intended to allow the Commission to conclude, within a relatively short period of time, whether a formal investigation is necessary. The Ombudsman is not convinced that the Commission concluded this phase of the investigation within a reasonable period of time. However, given the conclusion that the Ombudsman reaches as regards the length of the formal investigation period (see below), it does not appear necessary to pursue this issue further.

**38.** For the sake of completeness, it should be added that the Commission's arguments that it had to deal with a large amount of repetitive information, systematic requests for extensions of deadlines and the necessity to translate several documents is not convincing. Even though at least some of these factors may well have caused delays, the Ombudsman considers that these delays are not such as to explain the overall length of that phase of the investigation.

## As regards the formal investigation procedure

**39.** The duration of the formal investigation procedure in relation to the complainant's state aid complaint concerns the time running from the Commission's 2007 decision until today, that is *six years*, since, to the Ombudsman's knowledge, the Commission has still not taken a decision on the complainant's state aid complaint. In the following, the Ombudsman therefore needs to assess whether the arguments put forward by the Commission are capable of justifying the amount of time taken by the Commission.

**40.** First, the Commission argued that the Court's judgment in *Ryanair v Commission* had important implications for all the on-going airport investigations raising similar issues, and made it necessary to commission a report by an external consultant. In this respect, the Ombudsman recalls that in *Ryanair v Commission*, the Court annulled a Commission decision concerning state aid because the latter had wrongly applied the market investor principle. This led the Commission to ask an external consultant to prepare a report on the issue of the 'market economy investor principle'. Even if one were to assume that it was necessary for the Commission to ask for such a study, the Commission itself seems to accept that the period of nearly 19 months that was needed until that report was completed was rather long. In any event, it should be noted that even more than two and a half years have elapsed since the submission of the report, without the Commission having yet reached a final decision in its state aid investigation.

**41.** As regards the Commission's explanation that the delay is due to the fact that the air service market considerably evolved following the expansion of low cost companies requiring a modernisation of the relevant state aid rules, in particular the Aviation Guidelines, the Ombudsman does not find this argument entirely implausible at first sight. However, it appears that the original Guidelines, which are from 2005 and thus postdate the complainant's state aid





complaint by nearly two years, appear already to take into account certain developments of the air market, including the rise of low cost airlines, and represent a modernisation of the applicable rules compared to the previous Guidelines from 1994. The Ombudsman does not doubt that the Commission is currently involved in a process of modernising the rules applicable to state aid. In fact, to the Ombudsman's knowledge, on 25 September 2013, the Commission closed its Consultation on the draft Guidelines on state aid to airports and airlines where it invited interested parties to provide their feedback [19] . However, the Ombudsman considers that it is not acceptable for the Commission to make the conclusion of a state aid investigation dependent on an ongoing modernisation process of certain internal rules and guidelines. If this were otherwise, the conclusion of the Commission's investigation would essentially be made dependent on an unforeseeable event which could hardly be reconciled with the principles of good administration.

42. In any event, the Ombudsman wishes to underline that, in its opinion on the present complaint which it submitted in October 2012, the Commission asserted that it would take a decision as regards the complainant's state aid complaint " *as soon as possible* " and, in any event, envisaged " *being in a position to take a final decision in the coming months* ". However, more than a year has passed since without, to the Ombudsman's knowledge, any decision on the complainant's state aid complaint by the Commission.

43. In light of the above, the Ombudsman considers that, contrary to the principles of good administration and in particular the principle that decisions should be taken within a reasonable time, the Commission failed to take a timely decision on the complainant's state aid complaint, which amounts to an instance of maladministration. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

## B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

**Taking into account the Ombudsman's findings, the Commission should take a decision on the complainant's state aid complaint as rapidly as possible but in any event not later than 30 June 2014 and apologise to the complainant for the delay in handling its complaint.**

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 January 2014. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.





Emily O'Reilly

Done in Strasbourg on 6 December 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Article 265 TFEU stipulates the following: "*Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months. Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice of the European Union that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion*".

[3] Case T-395/04 *Air One Spa v Commission* [2006] ECR II-1343.

[4] Article 108(2) TFEU stipulates that "*if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. [...]*".

[5] Commission decision C37/2007 – Italy - Air One/Ryanair - Aéroport d'Alghero, OJ 2008 C 12, p.7.

[6] Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643

[7] The essence of the MEIP is that when a public authority invests in an enterprise on terms and under conditions which would be acceptable to a private investor operating under normal market economy conditions, such investment does not qualify as a state aid.

[8] <http://www.ombudsman.europa.eu/en/resources/statute.faces> [Link]

[9] In this regard, the Commission drew attention to a relevant [press release](#) [Link] (available online, [http://europa.eu/rapid/press-release\\_IP-12-698\\_en.htm](http://europa.eu/rapid/press-release_IP-12-698_en.htm) [Link] ).

[10] Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p. 1.



[11] Communication from the Commission - Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ 2005 C 312, p. 1.

[12] Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643.

[13] Decision of the European Parliament on the Regulations and General Conditions governing the performance of the Ombudsman's duties. OJ 1994 L 113, p. 15, as last amended by Decision 2008/587/EC, Euratom of the European Parliament of 18 June 2008, OJ 2008 L 189, p. 25.

[14] Code of Best Practice for the conduct of State aid control procedures. OJ 2009 C 136, p. 13.

[15] See footnote 3 above.

[16] Paragraph 61 of the said judgment.

[17] Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, paragraphs 72 to 75, and Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, paragraphs 73 to 75.

[18] See footnote 3 above, paragraph 63.

[19] For more information as regards this subject, see:

[http://ec.europa.eu/competition/consultations/2013\\_aviation\\_guidelines/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_aviation_guidelines/index_en.html) [Link]